MOTION FILED
DEC 2 1 2001

(2)

No. 01-684

IN THE

Supreme Court of the United States

UNITED STATES COURT OF INTERNATIONAL TRADE,
Petitioner.

v.

UNITED STATES, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* SAVE DOMESTIC OIL, INC.

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF RESPECTING CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, Save Domestic Oil, Inc. ("SDO") hereby moves for leave to file the accompanying *amicus curiae* brief addressing whether this Court should grant review of the questions presented in the petition in this case.

The accompanying brief comports with the text and purpose of Rule 37.1 in that it "brings to the attention of the Court relevant matter not already brought to its attention by the parties." Specifically, the accompanying brief identifies what we believe to be the most critical flaw in the reasoning of the Court of Appeals for the Federal Circuit ("CAFC" or "Federal Circuit") in its underlying decision in Misc. Docket No. 01-679. The underlying proceeding focused on the failure of the U.S. Department of Justice and U.S. Department of Commerce ("Defendants") to comply with an order of the U.S. Court of International Trade while their request to stay that order was pending at the Federal Circuit. However, the Federal Circuit's opinion in No. 01-679 did not address whether this failure to comply could serve as the basis for criminal contempt proceedings.

This brief also provides the Court with 1) additional case law supporting the right of a court to enforce its orders, 2) additional information regarding the injury suffered by Save Domestic Oil as a result of the improper interlocutory appeal by Defendant United States to the Court of Appeals for the Federal Circuit, and 3) an explanation of why the Supreme Court should consider whether the Federal Circuit's recent decisions regarding interlocutory appeals serve to weaken what has been a consistent precedent across all of the circuits.

The Petition for Writ of Certiorari was docketed on November 8, 2001. On December 5, 2001, the Court ex-

tended the deadline for all responses to December 21, 2001. Therefore, this motion and the accompanying brief are timely filed. S. Ct. R. 37.2(a).

Save Domestic Oil, Inc., does not consider itself to be a "party" to this proceeding for purposes this submission. Black's Law Dictionary defines a "party" to an action as "a person whose name is designated on record as plaintiff or defendant." BLACK'S LAW DICTIONARY 1122 (6th ed. 1990). The same definition further states: "'Party' is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or equity, the party plaintiff or defendant . . .; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties." *Id.*

As stated in the Petition, this proceeding stems from an August 10, 2001, show cause hearing, at which Judge Aquilino asked Defendant United States to appear. Petition at ii. Save Domestic Oil was a party to the original anti-dumping and countervailing duty proceeding that led to the show cause hearing. However, counsel appeared at the hearing on August 10, 2001, as the representative of an interested person, not a party, since the focus of the proceeding was the failure of the United States to follow an order of the Court, not the merits of the antidumping action.

Similarly, Misc. Docket No. 679, which directly preceded the Petition for Writ of Certiorari, involved a Petition for Writ of Mandamus by Defendant United States to the Court of Appeals for the Federal Circuit. SDO entered an appearance and filed responses as a part of these proceedings, but again, its role was subsidiary and limited to advising the CAFC of its interest in the underlying unfair trade investigation and appeal. While SDO has a clear interest, it is simply not the focus of these proceedings.

Given the highly unusual nature of the underlying proceedings and the ambiguity of Rule 12.6 in this particular situation, SDO felt it appropriate to proceed as an amicus, which requires the additional burden of obtaining consent from all parties.

Petitioner and the United States have consented to the filing of the accompanying brief. The written consent of each party's counsel is attached to the Certificate of Service filed simultaneously herewith. SDO's position is that these are the only "parties" to the proceedings, and thus this Motion is not necessary. However, should SDO and other participants in the proceedings below be considered "parties" to this proceeding under Rule 12.6, the following other participants have withheld consent or taken no position: Saudi Arabian Oil Company, Petroleos Mexicanos, P.M.I. Comercio International S.A. de C.V., Pemex Exploracion y Produccion, Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation. Thus, we include this motion for leave to file the attached *amicus* brief.

For the reasons described above, Save Domestic Oil as movant here has an important stake in the Court's disposition of the instant petition, because resolution of this matter will allow SDO's underlying appeal to proceed. *See* Petition at 25. Accordingly, this Court should grant this motion for leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. A COURT MAY TAKE ALL APPROPRIATE STEPS TO ENSURE THAT ITS ORDERS ARE ENFORCED	3
II. THE FEDERAL CIRCUIT'S OPINION FAILED TO CONSIDER DEFENDANTS' FAILURE TO OBTAIN A STAY PENDING APPEAL	5
III. THE GOVERNMENT AND THE CAFC'S FAILURE TO ACT HAS HARMED SAVE DOMESTIC OIL	6
IV. THIS COURT SHOULD CLARIFY THE FEDERAL CIRCUIT'S POSITION REGARDING INTERLOCUTORY APPEALS	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES	Page
Adams v. Principi, 256 F.3d 1318 (Fed. Cir. 2001)	7
Dambach v. Gober, 223 F.3d 1376 (Fed. Cir. 2000)	7
Howat v. Kansas, 258 U.S. 181 (1922)	4, 6, 7
In re United States, Misc. Docket No. 679 (Fed. Cir. Sept. 28, 2001)	4, 5, 7
Maness v. Meyers, 419 U.S. 449 (1975)	3, 6
Save Domestic Oil v. United States, Docket No. 01-1091 (Fed. Cir. July 31, 2001)	7
Save Domestic Oil v. United States, 116 F.Supp.2d 1324 (CIT 2000)	5, 6
Save Domestic Oil v. United States, 122 F.Supp.2d 1375 (CIT 2000)	8
Southern California Edison Co. v. United States, 226 F.3d 1349 (Fed. Cir. 2000)	7
Travelstead v. Derwinski, 978 F.2d 1244 (Fed. Cir. 1992)	7

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BRIEF OF *AMICUS CURIAE* SAVE DOMESTIC OIL, INC.

INTEREST OF *AMICUS CURIAE*

Save Domestic Oil, Inc. ("SDO"), is an incorporated consortium of independent domestic crude oil producers formed for the purpose of petitioning the U.S. Department of Commerce and the U.S. International Trade Commission in June 1999 for relief from unfairly traded imports of crude oil.[1] SDO was a respondent in Miscellaneous Docket No. 679, *In re United States*, which resulted in a September 28, 2001, *per curiam* decision by the U.S. Court of Appeals for the Federal Circuit. ("In re United States"). This decision was the subject of a Petition for Writ of Certiorari filed with this Court on November 8, 2001, on behalf of the U.S.

[1] This brief was wholly authored by counsel for *amicus curiae* Save Domestic Oil, Inc., as listed on its cover, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Court of International Trade, ("Court of International Trade" or "CIT") by Thomas J. Aquilino, Jr., a Judge of the Court.

We do not take a position on the merits of the Court of International Trade's criminal contempt inquiry. However, we believe that the underlying issue—compliance with and enforcement of judicial orders—merits consideration by this Court.

SUMMARY OF ARGUMENT

The U.S. Government has failed to comply with an order of the Court of International Trade. The order, issued by Judge Aquilino of the U.S. Court of International Trade, directed the government to initiate antidumping and countervailing duty investigations on or before November 18, 2000, or to provide remand results by that time. The government did neither, instead appealing the CIT's decision to the Court of Appeals for the Federal Circuit. The government requested, but did not obtain, a stay of the CIT's order pending the interlocutory appeal. The government was not in compliance with the CIT's order for approximately 260 days.

In view of this failure to comply with the Court's lawful order, it was not an abuse of discretion for the CIT to initiate proceedings to determine whether any government officials should be charged with contempt. It was, however, an abuse of discretion for the Federal Circuit to grant the government's petition for a writ of mandamus, and to direct the CIT to vacate its orders initiating the contempt inquiry.

Because the CAFC's opinion in *In re United States* contradicted its opinion in *Save Domestic Oil v. United States*, undermined a long line of precedent disfavoring interlocutory appeals, and permitted delay that has injured SDO, its decision should be reversed.

ARGUMENT

I. A COURT MAY TAKE ALL APPROPRIATE STEPS TO ENSURE THAT ITS ORDERS ARE ENFORCED

As stated by the United States Court of International Trade in its Petition for Writ of Certiorari, all orders and judgments of courts must be complied with promptly. This Court's opinions on this subject have consistently reinforced this position:

> [T]he basic proposition [is] that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.

Maness v. Meyers, 419 U.S. 449, 458-459 (1975). Here, the U.S. Government chose to "risk criminal contempt" by refusing to comply with the order of the CIT even though no stay had been granted. *Id.*

The U.S. Government argues that the criminal proceedings were in response to its decision to appeal. But this assertion is incorrect. It was the failure of the U.S. Government to comply with the Court's order after the CAFC failed to act on the motion of a stay that led to the CIT order. It is not disputable that the pendency of an appeal does not alter the duty of defendants with regard to an order issued by a court:

> It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to

> be respected, and disobedience of them is contempt of its lawful authority, to be punished.

Howat v. Kansas, 258 U.S. 181, 190 (1922). Since the CAFC failed to act on the motion for stay, the U.S. Government had no justification for its failure to comply with the CIT's order. This failure was the focus of the proceedings before the CIT.

In its *per curiam* opinion, the Federal Circuit denied the Court of International Trade the ability to enforce its orders and judgments. By granting an extraordinary writ of mandamus, and then by determining that the CIT's initiation of contempt proceedings was an abuse of discretion, the appellate court precluded the Court of International Trade from ensuring that its orders in this case were respected and followed by the U.S. Departments of Justice and Commerce.

The Federal Circuit's opinion states that the remedy of mandamus is available "only in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power." *In re United States*, No. 679 (Fed. Cir. Sept. 28, 2001) (Pet. App. A, p. 3a). However, the appellate court then usurps the CIT's power, concluding that the lower court may not even initiate criminal contempt proceedings to enforce its own orders. Before any fact-finding has begun, the appellate court has declared such an inquiry to be unlawful. This is particularly troubling because, as explained in Part II, *infra*, the appellate court did not address the key issue of concern to the CIT when it initiated its contempt inquiry.

II. THE FEDERAL CIRCUIT'S OPINION FAILED TO CONSIDER DEFENDANTS' FAILURE TO OBTAIN A STAY PENDING APPEAL

The Federal Circuit's brief opinion in *In Re United States* does not address the most crucial aspect of the current proceeding. In its *per curiam* opinion, the Federal Circuit writes:

> Contempt proceedings should not be initiated unless in response to action that is clearly unjustified. *Filing a notice of appeal and seeking a stay in this case were not clearly unjustified.*

In re United States (Pet. App. A, p. 3a) (emphasis added). In the next paragraph, the appellate court reaches the same conclusion:

> Thus, the [Defendants'] determination to seek review of the remand order in this case, and the government's request for a stay of that remand order, cannot serve as a basis for criminal contempt proceedings.

Id. (App. A, p. 4a.) But the central issue before the CIT was neither the government's decision to appeal, nor its decision to request a stay. It was the government's failure to act when the stay request was not granted. Defendants, despite "seeking a stay," never in fact received a stay. The Court of International Trade quickly denied the government's motion, and the Federal Circuit never acted on it. (Interestingly, the Federal Circuit's *per curiam* decision in *In Re United States* does not even acknowledge that there was a stay request pending before it for approximately 260 days, or that it took no action on the stay request during this time.)

Defendants did not take sufficient steps to ask the Federal Circuit to act on their stay request. More importantly, Defendants did not take any steps to comply with the CIT's order of September 19, 2000, in *Save Domestic Oil, Inc. v.*

United States while their request to stay that order was pending at the CAFC.[2] This order required the Commerce Department to initiate the unfair trade investigations that were the subject of Save Domestic Oil's petitions or, in the alternative, to provide remand comments to the CIT explaining why it would not initiate such investigations.

In view of this failure to comply with its lawful order, it was not an abuse of discretion for the CIT to begin proceedings to determine whether there is a basis for contempt charges. We take no position on the merits of the issues that would be raised by these proceedings, but it was improper and an abuse of discretion for the Federal Circuit to deny the right of the Court of International Trade to enforce its own orders. The Federal Circuit should not have granted the government's petition for writ of mandamus. Indeed, the Federal Circuit has undermined this Court's rulings in *Maness v. Meyers*, *Howat v. Kansas*, and other related cases, in effect by permitting an interlocutory appeal and an ungranted stay request to function as a *de facto* stay.

III. THE GOVERNMENT AND THE CAFC'S FAILURE TO ACT HAS HARMED SAVE DOMESTIC OIL

These proceedings have not occurred in a vacuum. The delays that have occurred in this case have harmed the original petitioner, Save Domestic Oil. SDO was, and is, disturbed by the delay and expense caused by the Government's interlocutory appeal to the Federal Circuit, and it has suffered harm as a result.

The Government's interlocutory appeal, the CAFC's failure to act on the government's stay request, and the Government's failure to act in the absence of a granted stay,

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[2] *See Save Domestic Oil, Inc. v. United States*, 116 F. Supp. 2d 1324 (CIT 2000). Pet. App. D.

have left SDO without recourse to U.S. unfair trade remedies during the interim period. Even today, more than two years after SDO filed its petitions, the initiation of antidumping and countervailing duty investigations appears no closer than it did in June 1999.

Indeed, further delay appears likely. On December 17, 2001, defendant-intervenors Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation filed a motion to disqualify Judge Aquilino from the ongoing proceedings in *Save Domestic Oil, Inc. v. United States*, based on his filing of the Petition for Writ of Certiorari. Intervenors' Motion to Disqualify, No. 99-09-00558 (CIT Dec. 17, 2001).

IV. THIS COURT SHOULD CLARIFY THE FEDERAL CIRCUIT'S POSITION REGARDING INTERLOCUTORY APPEALS

Defendants' interlocutory appeal was inappropriate and unsupported by precedent, as the first Federal Circuit panel readily concluded. However, in its *per curiam* opinion issued as *In re United States*, the Federal Circuit justifies the U.S. Government's interlocutory appeal by citing several prior instances where such appeals were permitted. These cases include *Adams v. Principi*, 256 F.3d 1318, 1321 (Fed. Cir. 2001), *Southern California Edison Co. v. United States*, 226 F.3d 1349, 1355 (Fed. Cir. 2000), *Dambach v. Gober*, 223 F.3d 1376, 1379 (Fed. Cir. 2000), and *Travelstead v. Derwinski*, 978 F.2d 1244, 1248 (Fed. Cir. 1992). *In re United States* (Pet. App. A, pp. 3a-4a).

These cases were readily distinguishable from Defendants' appeal. Each addressed the merits of the case and involved an issue that could have evaded review on appeal; the Government's interlocutory appeal did neither. Even so, however, it is notable that three of the four cases cited by Defendant United States to justify its appeal were decided by the Federal Circuit within the last two years. This apparent

trend toward allowing interlocutory appeals, even in circumstances that the courts may attempt to limit to specific facts—is a disturbing one.

The law of every Circuit is plain on the question of interlocutory appeals: the courts have no jurisdiction over such appeals. *See* Pet. at 16-17; *Save Domestic Oil, v. United* States, 122 F.Supp.2d 1375, 1377-78 (CIT 2000), (Pet. App. C) (citing six Federal Circuit cases and case law in every other federal judicial circuit). To the extent that *In re United States* undermines this clear line of precedent, it should be vacated.

There is a strong public policy interest here as well: Interlocutory appeals should not be used by federal agencies to avoid making difficult policy judgments. The crude oil petitions were extremely sensitive and generated almost unprecedented controversy upon their filing. After Judge Aquilino's order was issued in the first SDO appeal, the Commerce Department faced a difficult decision: whether to initiate a politically charged case or to again reject SDO's petitions (and its own precedent for initiating such petitions). But instead of confronting this decision, the agency decided to delay, by seeking a stay at the Court of Appeals for the Federal Circuit.

Such avoidance is impermissible. This Court should clarify that interlocutory appeals are prohibited, absent extraordinary and compelling circumstances. Because the CAFC's opinion in *In re United States* contradicted its opinion in *Save Domestic Oil v. United States*, undermined a long line of precedent disfavoring interlocutory appeals, and permitted delay that has injured SDO, its decision should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Federal Circuit should be reversed.

Respectfully submitted,

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December 21, 2001